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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 434

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MEXIA TEXTILE MILLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 15-37) are not reported. The *per curiam* opinion of the Court of Appeals (R. 58-59) is reported in 25 L. R. R. M. 2295.

JURISDICTION

The order of the Court of Appeals was entered on June 3, 1949 (R. 59). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a

petition for a writ of certiorari was extended to and including October 28, 1949 (R. 60). On October 28, 1949 the Board filed its petition for a writ of certiorari, which was granted on January 9, 1950 (338 U. S. 909). The jurisdiction of this Court rests on Section 10 (e) of the National Labor Relations Act, as amended, and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether questions concerning subsequent compliance by an employer with an order of the National Labor Relations Board may properly be considered by a court of appeals in connection with a petition by the Board to enforce its order.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. (Supp. II) 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 25-27.

STATEMENT

Pursuant to an amended charge (R. 6-7) filed by Textile Workers Union of America, CIO, herein called the Union, the Board on June 27, 1947, issued its complaint (R. 8-10) against Mexia Textile Mills, Inc., herein called the Company, alleging that the Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act. In its answer the company denied that the Union "is now the exclusive representative of all

the employees" in the unit agreed to be appropriate for the reason that such employees had withdrawn from membership in the Union; it further denied that it had engaged in any unfair labor practices (R. 11, 12-13). A hearing on the complaint was held before a trial examiner who thereafter, on December 18, 1947, issued his intermediate report (R. 15-30) finding that the Company had refused to bargain with the Union, which had been duly certified by the Board as the exclusive bargaining representative of the Company's employees within an appropriate bargaining unit, in violation of Section 8 (5) and (1) of the Act. The examiner found no merit in the contention that the Union no longer represented a majority of the employees (R. 18).

The trial examiner's conclusion that the Company had refused to bargain was based upon evidence summarized in his intermediate report showing that from almost the inception of bargaining conferences on November 25, 1944, and thereafter throughout the period of over two years before the Board hearing, the Company manifested its intention never to reach any agreement with the Union (R. 19-30). This settled intention, the trial examiner found, was in effect announced by the Company's attorney and bargaining representative, Scott, early in the negotiations, when he told the Union that it would never succeed in obtaining a bargaining contract because the Company's

officials lacked an understanding of the problems of labor relations and were violently antagonistic toward the CIO and its international unions (R. 20, 28). The trial examiner also found that the Company manifested its intention never to enter into an agreement with the Union by its conduct in repeatedly purporting to shift responsibility for its decisions and actions from one of its representatives to another; in making and thereafter repudiating promises and tentative agreements; in refusing to sign a contract embodying the Company's own terms assertedly for the sole reason that it was not ready to sign a contract; in delaying upon some occasions and refusing upon other occasions to meet with union representatives; in unilaterally determining and announcing wage increases and changes in working conditions during the period when the Union was attempting to bargain in regard to them; and in continuously refusing to meet with the Union's grievance committee. To remedy these unfair labor practices, the trial examiner recommended that the Company cease and desist therefrom; upon request, bargain with the Union; and post appropriate notices (R. 31-34).

On December 18, 1947, the Board entered an order transferring the case to the Board and, on the same day, a copy of the order and the intermediate report were duly served upon the Company (R. 34). The Company at no time there-

after filed any exceptions to the intermediate report (R. 35). Section 10 (c) of the Act, as amended,[1] and Rules 203.46 and 203.48 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 22, 1947 (12 F. R. 5656),[2] in effect at the time the intermediate report herein was issued, provide that if no exceptions are filed, the order recommended by the trial examiner shall become the order of the Board.

The Board, accordingly, on July 2, 1948, issued its order (R. 34-37), adopting the findings, conclusions and recommended order set forth in the intermediate report. On April 11, 1949, the Board filed in the court below the certified record in the case and its petition for enforcement of its order (R. 1-5, 37-38). Thereafter, on May 6, 1949, the Board filed a motion for the summary entry of a decree upon the transcript of the record (R. 38-55),

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[1] Section 10 (c) provides that the "examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

[2] The Rules provide that any party desiring to file exceptions to an intermediate report and recommended order must do so within twenty days from the date of the service of the order transferring the case to the Board and that if no such exceptions are filed, the findings, conclusions and recommendations contained in the intermediate report and recommended order shall be adopted by the Board as its findings, conclusions and order, and that all objections and exceptions thereto shall

alleging that in view of Section 10 (e), mentioned above, and of Section 10 (c) of the Act, as amended, which provides that no objection which has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances, there were no contestable issues before the court.

In response to the Board's motion for the summary entry of a decree, the Company, on May 16, 1949, filed in the court below a motion to adduce evidence (R. 55-58). In its motion, the Company alleged that it had complied with the order recommended by the trial examiner and that it did not believe that the Union continued to represent a majority of its employees.

The court below, on June 3, 1949, entered its order deferring action on the Board's motion for the summary entry of a decree and remanding the case to the Board with directions to take evidence and report: (1) whether and to what extent its order had been complied with; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises (R. 59).[3]

[3] The court below did not direct the Board to take evidence as to whether, as the Company claimed, the Union had ceased to represent a majority of the Company's employees. Cf. *Franks Bros. Company* v. *National Labor Relations Board*, 321 U. S. 702.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deferring action on the Board's motion for the summary entry of a decree upon the transcript of the record.

2. In remanding the case to the Board with directions to take evidence and report to it on questions concerning compliance with the Board's order.

3. In failing to grant the Board's motion for summary entry of a decree upon the transcript of the record.

SUMMARY OF ARGUMENT

I

In proceedings under Section 10 (e) or (f) of the Act to enforce an order of the Board, leave may be granted in appropriate circumstances to adduce additional evidence where it is shown to the satisfaction of the court that the evidence is material. As shown by the decisions of this Court, the legislative history and the decisions of all of the courts of appeal which have considered the matter, evidence that the Board's order has been complied with is not material. The fact that respondent has complied with the Board's order may be shown as a defense in proceedings to adjudge respondent in contempt for failing to obey a court decree enforcing the Board's order, but until such a decree has been entered the question

f compliance cannot be put in issue. This rule s essential to the effective enforcement of the Act. Since the only issue of fact on which the Court lirected the Board to take evidence was whether nd to what extent the Company has complied with he Board's order, its action in remanding the case o the Board was clearly erroneous.

II

Since the Company never contested the validity of the Board's order either before the Board or before the court below and has never asked leave to adduce additional material evidence tending to show that the order should not now be enforced, he court erred in failing to grant the Board's motion for summary entry of a decree enforcing the order.

ARGUMENT

I

The Court Below Erred in Remanding the Case to the Board With Directions to Take Evidence and Report to It on Questions Concerning Compliance With the Board's Order

Section 10 (e) authorizes the court to remand a cause to the Board for the purpose of taking additional evidence where it is shown to the satisfaction of the court that the "*evidence is material* and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board." (Italics supplied.) Applications for leave to adduce additional evidence under

this provision are addressed to the sound discretion of the court, *National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219, but here, as elsewhere in the law, the discretion must be exercised subject to the conditions imposed by statute. Cf. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30-31. One of the conditions imposed by the Act upon the granting of leave to adduce additional evidence is that the evidence be material. As this Court had occasion to point out in *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104, "to ensure that the applicable part of Section 10 (e) would be used only for proper purposes, and not abused by resort to it as a mere instrument of delay, Congress provided that *before the court might grant relief thereunder it must be satisfied of the materiality of the additional evidence* * * *." (Italics supplied.)

In the case at bar, the court below remanded the cause to the Board for the purpose of taking evidence and reporting first, as to "whether and to what extent its order has been complied with by respondent"; secondly, as to "whether and why, if the order has been complied with, the matter should not be dismissed as moot"; and thirdly, "if the matter is not moot, what recommendations or requests the Board has to make in the premises" (R. 59). The substance and effect of the court's order was to remand the cause to the Board for the purpose of taking evidence on the question

whether the Company had complied with the Board's order. Such evidence is clearly not relevant or material under the rule enunciated by this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, and reaffirmed as recently as May, 1949 in *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225: "an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." From this rule and its corollary that notwithstanding the discontinuance by an employer of an unfair labor practice the Board is "entitled to bar its resumption", *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; cf. *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257, it is apparent that evidence of compliance cannot affect the outcome of a proceeding to enforce a Board order. To permit the production of such evidence would only serve to delay the proceeding and thus thwart the very purpose for which the requirement of materiality was inserted in the statute. *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104.

Not only the decisions of this Court, but the legislative history of the Act as well, makes it abundantly clear that the question of compliance

cannot properly be put in issue in a proceeding to enforce an order of the Board. Congress, foreseeing the possibilities of delay and confusion that might otherwise result, refused at the time it passed the original Act and again when it amended the Act in 1947, to make compliance with a Board order a basis for withholding an enforcement decree. To obviate the materiality of questions of compliance, the Conference Committee, in 1935, deliberately adopted the language of Section 10 (e) of the Act (49 Stat. 449) instead of the language in the original Federal Trade Commission Act (38 Stat. 717, 720), which had been proposed in the Senate bill, because some courts had interpreted the latter Act as making non-compliance a condition precedent to the right of the Federal Trade Commission to obtain enforcement decrees. In making this change, the Conference Committee explained (H. Rep. No. 1371, 74th Cong., 1st sess., p. 5):

> Section 10 (e) of the Senate bill provided that "if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may" petition any circuit court of appeals, etc. House amendment numbered 15 strikes out the quoted phrase and substitutes "The Board shall have power to" petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure

due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

The legislative history of the Labor Management Relations Act, 1947, discloses that Congress again considered and rejected proposals that Section 10 (c) be amended to make compliance with Board orders an issue in enforcement proceedings. Section 10 (c) of the House bill provided that "If any person against whom an order of the Board shall issue fails to comply therewith within such reasonable period as the Board shall specify, or thereafter shall violate such order, the Administrator shall petition" for enforcement of the Board's order. H. R.

3020, as passed by the House, 80th Cong., 1st Sess., p. 40; Report of the House Committee on Education and Labor, H. Rep. No. 245, on H. R. 3020, 80th Cong., 1st Sess., p. 43; H. Rep. No. 245, Minority Report, p. 93. The Senate bill retained the language of Section 10 (c) of the Wagner Act. H. R. 3020, as passed by the Senate, 80th Cong., 1st Sess., p. 96; S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 26. The Conference Committee recommended adoption of the version of Section 10 (c) contained in the Senate bill, and Congress enacted that provision. H. Conf. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., p. 55.[4] Even if Congress had not specifically passed upon the amendment proposed in the House bill, its reenactment, without change, of the provision of Section 10 (e) in question after many years of uniform judicial construction and application would be deemed an expression of legislative satisfaction with the construction so adopted. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500; *Heald* v. *District of Columbia*, 254 U. S. 20, 23.

With the exception of the court below, all of the courts of appeals which have had occasion to pass on the question have uniformly refused to permit questions of compliance to be litigated as a condition precedent to the entry of an enforcement de-

[4] These documents cited in this paragraph are reprinted in Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), pp. 70, 197, 334, 384, 559.

cree.[5] Even the court below, in decisions rendered both before and since the one under review, has ruled that allegations by the employer that he has complied with the Board's order are no defense to an application to enforce the order. *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. 2d 497, 498 (C. A. 5); *National Labor Relations Board* v. *Fickett-Brown Mfg. Co.*, 140 F. 2d 883, 884 (C. A. 5); *National Labor Relations Board* v. *Hills Bros.*

[5] See *e.g.*, the following cases:

First Circuit: *National Labor Relations Board* v. *Draper Corporation*, 159 F. 2d 294, 297; *National Labor Relations Board* v. *L. H. Hamel Leather Co.*, 135 F. 2d 71, 72-73; *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252.

Second Circuit: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421.

Third Circuit: *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. 2d 393, 394; *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81.

Fourth Circuit: *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 55-56.

Sixth Circuit: *National Labor Relations Board* v. *Toledo Desk & Fixture Company*, 158 F. 2d 426; *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 621; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 300.

Seventh Circuit: *National Labor Relations Board* v. *Bachelder*, 125 F. 2d 387, 388; *National Labor Relations Board* v. *Gerling Furniture Manufacturing Co., Inc.*, 103 F. 2d 663.

Eighth Circuit: *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239, certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 224.

Ninth Circuit: *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 250; *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. 2d 488.

Tenth Circuit: *National Labor Relations Board* v. *United Brotherhood of Carpenters and Joiners*, 178 F. 2d 402; *Pueblo Gas & Fuel Co.* v. *National Labor Relations Board*, 118 F. 2d 304, 307.

District of Columbia: *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590.

Co., 161 F. 2d 179, 180 (C. A. 5); *National Labor Relations Board* v. *Davis*, 172 F. 2d 225 (C. A. 5); and *National Labor Relations Board* v. *The Cooper Company*, 179 F. 2d 241 (C. A. 5). In its latest decision, *National Labor Relations Board* v. *The Cooper Company*, *supra*, the court below said that the decisions now under review in this and in its companion case, *National Labor Relations Board* v. *Pool Manufacturing Company*, No. 435, this Term, were not intended to be departures from the rule followed in the *Hills Bros. Co.* and *Davis* cases, *supra*, adding—

> Indeed, nothing was decided there [i.e., in this and the *Pool* case]. The court, expressly deferring decision, merely referred the matter back to the Board for its assistance in furnishing further information and for its recommendations or requests in the light of such further information.

Although the court below has thus disclaimed an intention to hold that proof of compliance with a Board order may bar an enforcement decree, its action in remanding the case to the Board to take evidence and report on the question of compliance results in the very delay which Congress sought to avoid by making evidence of compliance immaterial at this stage. The remand was ordered in response to an application for leave to adduce additional evidence pursuant to Section 10 (e). Where, as here, the evidence sought to be adduced is immaterial, the

terms and policy of Section 10 (e) preclude reliance upon such evidence as a basis for delay in enforcing the Board's order.

In its brief in opposition to the petition for a writ of certiorari (p. 5), the Company itself tacitly conceded that compliance is not a defense to the Board's petition for enforcement. It said, "This case does not involve a contention on the part of the Respondent, nor a judicial determination, to the effect that mere compliance with the order of the Board is sufficient of itself to prevent a judicial decree of enforcement." The Company called attention to the fact that it sought leave to adduce additional evidence to show not only that it had complied with the Board's order so far as it was able to do so, but also that a year and a half had elapsed since the Board's order was entered and that in the interim the Union may have ceased to represent a majority of the Company's employees, another labor organization having asserted that it represents a substantial number of such employees. It seems to be the Company's contention that while compliance standing alone is not a defense, compliance when coupled with a lapse of time and the loss by a collective bargaining representative of its majority is a defense to an application to enforce an order of the Board requiring an employer to bargain with such representative. The contention is palpably unsound. The short answer to it is that the court below did not direct the Board to

take evidence on the question whether the Union had lost its majority. In any case, loss by a union of its majority is not a defense to a proceeding such as this where, as here, the loss follows a refusal to bargain or other unfair labor practice on the part of the employer. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702. If the Union has lost its majority and another labor organization has presented to the Company a claim to be recognized as the collective bargaining representative of its employees, those facts would support an application to the Board by either the Company or the labor organization for an election,[6] but they cannot serve to defeat enforcement of the Board's order. Nor can delay by the Board in seeking enforcement of the order, in and of itself, be asserted as a defense. *Phelps-Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 200, affirming, 113 F. 2d 202, 206 (C. A. 2); *National Labor Relations Board* v. *Todd Co.*, 173 F. 2d 705.

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[6] Section 9 (c) (1) (B) provides that "Whenever a petition shall have been filed * * * by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9 (a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Even when no other labor organization is claiming to be the statutory representative, the employees may seek to rid themselves of an incumbent union by filing a decertification petition pursuant to Section 9 (c) (1) (A).

708 (C. A. 2); *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.*, 172 F. 2d 813, 816 (C. A. 4); *National Labor Relations Board* v. *Sewell Manufacturing Co.*, 172 F. 2d 459, 461 (C. A. 5); *National Labor Relations Board* v. *La-Salle Steel Co.*, 178 F. 2d 829, 835-836 (C. A. 7); *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134 (C. A. 9), certiorari denied, 338 U. S. 827.

Compliance with the Board's order either before or after entry of a decree of enforcement may, of course, be asserted as a defense to a proceeding to adjudge the party to whom the decree is directed in contempt for failure to obey its command. But until a decree is entered, compliance or noncompliance is an irrelevant issue. A Board order "speaks as of the time of the hearing and is founded upon the record before the Board." *National Labor Relations Board* v. *Acme Air Appliance Co.*, 177 F. 2d 417, 421 (C. A. 2). The effect of a court decree enforcing a Board order, therefore, is to approve the validity of the order as of the date it was entered, and problems arising out of occurrences subsequent to that date should "properly * * * be resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted." *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106. Accordingly, a court decree enforcing a Board order is not an inexorable command to the employer to take affirmative action

which he has already taken [7] or which because of intervening circumstances cannot be taken.

Thus, if prior to a court decree requiring the employer to offer back pay to a discriminatorily discharged employee, the employer has already given the employee back pay, he need not do so again subsequent to the decree. Similarly, if, at the time of the entry of a court decree enforcing a bargaining order, the employer has already bargained in good faith for a period long enough to dissipate the effects of its unfair labor practice and also long enough to permit the bargaining relationship to work successfully, and thereafter the Union, for reasons other than the employer's unfair labor practices, loses its majority status, the court decree requiring the employer to resume bargaining with the Union need not be the last word. In the last hypothetical situation, unless unfair labor practices in addition to a refusal to bargain were involved, it is unlikely, in the first place, that the Board would petition a court for enforcement of its bargaining order; but if it did, the Board, subsequent to the enforcement decree, would probably entertain a representation or decertification petition rather than attempt to require the employer to renew bargaining negotiations. Even then, an enforcement decree

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[7] Cf. *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421 (C. A. 2); *National Labor Relations Board* v. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 224 (C. A. 8).

might be advantageous, for, if the Union reestablished its majority status and the employer again refused to bargain with it, the Board could institute contempt proceedings rather than start anew with another unfair labor practice proceeding.

The entry of a decree enforcing a Board order without affording the respondent the opportunity of litigating the question of compliance imposes no hardship on him. "After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear. The defendant on his part can invoke no other interest except an escape from whatever stigma attaches to a finding against him, and to the court's refusal to accept his promise that he will not repeat the wrong. Ordinarily that will not be a counterweight to the protection of which the plaintiff has shown he was once in need, and which he will need again, should the defendant change his mind." *National Labor Relations Board* v. *General Motors Corporation,* 179 F 2d 221, 222 (C. A. 2). So long as the respondent does not wilfully violate the decree he cannot be held guilty of criminal contempt. Cf. Moskovitz, *Contempt of Injunctions, Civil and Criminal,* 43 Columbia Law. Rev. 780, 793. He may, of course, be adjudged guilty of civil contempt even though the violation of the decree is not wilful. *McComb*

v. *Jacksonville Paper Co.*, 336 U. S. 187, 191. But in such a case only a remedial sanction may be imposed. To use the oft-repeated metaphor of Judge Sanborn, the respondent "carries the keys to his prison in his pocket." *In re Nevitt*, 117 Fed. 448, 461 (C. A. 8); *Maggio* v. *Zeitz*, 333 U. S. 56, 68; *Penfield* v. *Securities and Exchange Commission*, 330 U. S. 585, 590.

Only by treating the question of compliance as irrelevant in enforcement proceedings can delay and impediment to the proper administration of the Act be avoided. After the Board has administratively determined the desirability of obtaining an enforcement decree—whether such determination is based on its opinion that the order has not been obeyed, or, if obeyed for a while, that the unfair labor practices enjoined are being repeated or are likely to be repeated,[8] the reason for the

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[8] The Board's practice in this regard, published in the Federal Register (12 Fed. Reg. 5651) as a part of its Statements of Procedure, effective August 22, 1947, is described as follows: "Sec. 202.13. *Compliance with Board decision and order.*—(a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order. (b) The regional director submits to the Board a report on compliance when compliance is obtained. This report must meet the approval of the Board before the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order

Board's request for an enforcement decree should not be the subject of litigation. To open the wisdom of this administrative determination to review by the courts might, in the words of Judge Goodrich, make "a merry-go-round of the Act." *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81 (C. A. 3). If a plea of compliance can now validly hold up enforcement of the order in this case, then it can just as validly hold up enforcement of the order after the Board has conducted a hearing of the kind directed by the court below; the case might again be remanded to determine compliance questions which might arise subsequent to the second hearing, and so on *ad infinitum*. Successful administration of legislation such as the Act depends in large measure upon the promptness with which its guarantees are enforced. The course of action directed by the court below therefore seriously jeopardizes the effectual administration of the Act.

II

The Court Below Erred in Not Granting the Board's Motion for Summary Entry of a Decree Upon the Transcript of Record

Since, as shown in the Statement, *supra*, pp. 4-6, the Company has never contested the validity

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with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

"Sec. 202.14. *Judicial review of Board decisions and orders.* If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement. * * *"

of the Board's order either before the Board or before the court below, no issue as to the propriety of the order exists (Section 10(c) and (e) of the Act, as amended).[9]

The court below, accordingly, was under a duty to enforce the Board's order. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 342-343. This Court, in the latter case, aptly described the duty of the court of appeals in the statutory scheme, as follows:

> Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If

[9] In filing its motion in the court below for the summary entry of a decree upon the transcript of the record, dispensing with the necessity of printing the record and orally arguing before the court, the Board followed its usual procedure in cases of this type. This procedure has been uniformly approved by the courts, including the court below. See *National Labor Relations Board* v. *Cordele Manufacturing Co.*, 172 F. 2d 225 (C. A. 5); *National Labor Relations Board* v. *Davis*, 172 F. 2d 225 (C. A. 5); *National Labor Relations Board* v. *The Cooper Co.*, 179 F. 2d 741 (C. A. 5); *National Labor Relations Board* v. *Amory Garment Company*, 24 L. R. R. M. 2274 (C. A. 5); *National Labor Relations Board* v. *Rowland* (C. A. 5, No. 12829); *National Labor Relations Board* v. *Woodruff* (C. A. 5, No. 12850); *National Labor Relations Board* v. *Ulin Box and Lumber Co.* (C. A. 7, No. 9588); *National Labor Relations Board* v. *Griffin-Goodner Grocery Co., Inc.*, (C. A. 10, No. 3752); *National Labor Relations Board* v. *Gunn* (C. A. 3, No. 9822); *National Labor Relations Board* v. *Star Metal Mfg. Co.* (C. A. 3, No. 9981); *National Labor Relations Board* v. *Hill Transportation Co.* (C. A. 1, No. 4395); *National Labor Relations Board* v. *Lancaster Foundry Corporation* (C. A. 6, No. 10847).

the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing," which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required.

CONCLUSION

It is respectfully submitted that the order of the court below should be reversed and the cause remanded with instructions to enter a decree enforcing the Board's order.

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APRIL 1950.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. (Supp. II) 141, *et seq.*) are as follows:

* * * * *

SEC. 10.

* * * * *

(c) * * * In case the evidence is presented before a member of the Board, or before an

examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before

the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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